No. 3542

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

DAVID JAMES FLYNN, BARBARA FLYNN, and JOHN FLYNN, infants, by their guardian and prochain ami, HONORA DELLA FLYNN, HONORA DELLA FLYNN,

Appellants,

vs.

E. A. CHRISTENSON, HANS J. LUNVALDT, CHARLES E. SUDDEN, J. H. BAXTER, A. TAVIERA, W. B. GODFREY, JR., F. M. DELANO, WALTER V. ROHLFFS, R. L. ANDERSON, GEO. F. QUIGLEY, D. W. C. TIETJEN, CECELIA F. SUDDEN, HENRY BROOKS, R. Y. TAYLOR, ROBERT SUDDEN, JAS. JOHNSON CO. (a corporation), ALBERT ROWE, J. J. STAIGER, EDMUND JACOBS, R. C. SUDDEN, GEO. JOHNSON, JOHN L. HUBBARD, H. PILTZ, LOUIS POOLE,

Appellees.

BRIEF FOR APPELLEES.

NATHAN H. FRANK,
IRVING H. FRANK,
Proctors for Appellees.

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BRIEF FOR APPELLEES.

Statement.

The litigation which is the subject of this appeal was initiated nearly 17 years ago, and involves an injury

received on the 3rd day of August, 1903, by James Flynn, who was at that time in the employ of the owners of the schooner "Sophie Christenson" as a stevedore, in the discharge of a lumber cargo from that vessel at the port of San Pedro, California.

The injury thus suffered, resulted in the death of Flynn.

Each of the appellees, with the exception of E. A. Christenson, was at the date of the accident the owner of a separate share or shares in the vessel, and they are sued by the wife of Flynn in her own behalf, and that of her children, who have now all reached maturity, for damages which they claim arise out of the accident.

The action was filed on the 12th day of August, 1904, and was not set for hearing until April 12, 1920.

At the time of the accident the vessel was discharging by means of a rope sling with a single turn, which the testimony shows was in general use in the discharge of cargoes of the nature in question, and the Court in fact found that the rope sling was in general use, while the single turn was not unusual.

In discharging, the vessel lay with her port side to the dock, and with a slight list toward the wharf for the purpose of allowing the free swing of the cargo gaff, to the dock, when bearing the load. The loads were placed in a rope sling, which contained an eye at each end; one end of the sling was placed around the load and drawn securely through the eye at the other end, when the load was then attached by means of the free eye to the hook on the fall on the cargo gaff. The

load was then hoisted by means of a donkey engine and swung to the wharf.

Flynn, at the time of his injury, was working on the deck of the vessel, under the mate, and in the same relationship to the mate and the rest of the vessel's crew, as any member of the crew.

He had been thus engaged for in the neighborhood of from 2½ to 3 days before the accident, and was a man of experience as a longshoreman, and as mate of vessels, and was familiar with the discharge of lumber cargoes.

It is without dispute that chain slings were on board the vessel in addition to the rope slings used, and libelant's witness testifies that the slings were laid out by the mate, and that the men engaged in unloading the cargo picked the slings out themselves and made the load up in such sizes as they saw fit.

The situation at the time the injury was occasioned follows:

A sling load of lumber had been made up on the starboard side of the vessel by two members of the crew, Cainan and Ehlert. Flynn, together with a member of the vessel's crew, was at the same time engaged in making up a slingload on the vessel's port side.

The load made up by Cainan and Ehlert had been attached to the donkey-fall, the mate had given the order to the donkeyman to go ahead, and all had been warned to get out of the way, and had obeyed the warning. The slingload was hoisted, and the mate gave the order to lower away after it had swung across the deck

toward the wharf. In lowering away, the load struck the stringer of the wharf, causing some pieces of lumber to fall into the water between the vessel and the dock, and some other pieces to fall on the vessel's deck. As the vessel was at the time lower than the wharf, it is evident the load never cleared the vessel, and as the result of striking the stringer it was caused to swing back. One of the pieces of timber which fell to the deck struck Flynn, who had gone back to his particular load before the load which was being hoisted had been landed.

The injury which resulted in Flynn's death was thus occasioned.

Appellants claim that appellees were chargeable with negligence in not providing, as they allege, proper slings and a so-called Spanish burton to guide the load.

It is further contended that chain slings should have been supplied.

NO RIGHT OF ACTION IN THE LIBELANTS.

At the outset we desire to call the Court's attention to the fact that the death resulting from the injury on which this cause of action is based, occurred on the 3rd day of August, 1903. Amended Libel, art. VIII and XII; Rec. pp. 8 and 9; Testimony of Mrs. Flynn, Rec. p. 156.

The libel was filed herein on the 12th day of August, 1904, Rec. p. 3, or more than one year after the accident and death, and more than one year after the cause of action accrued.

As the right of action in the admiralty for death depends on the Statute of the State of California, Sec. 377, C. C. P., which is as follows:

> "When Representatives May Sue for Death of One Caused by the Wrongful Act of Another. When the death of a person not being a minor is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case, may be just."

And as a statute of the State of California limits the time within which such actions may be brought to one year, C. C. P. 340, Subd. 3:

> "Within One Year. 3. An action for libel, slander, assault, battery, false imprisonment, seduction or for injury to or for the death of one caused by the wrongful act or neglect of another or by a depositor against a bank for the payment of a forged or raised check,"

it is manifest that at the time the original libel was filed, there existed no cause of action in the libelants herein.

To quote from *Hughes on Admiralty,* 2 Ed., Sec. 113, p. 233:

> "Restrictions of State Statute Binding.
>
> As the right to sue depends on the state statute, it follows that the state, in giving the right, may name the conditions on which it is given. Hence the restriction of the right to sue to one year, contained in Lord Campbell's Act and embodied in

> nearly all the state statutes based upon it, is binding on suits in the admiralty court. *This is not a statute of limitations, but a condition on which the right is given,* and *performance must be shown by the plaintiff* as a part of his case."

The author then cites the cases of

> *Harrisburg,* 119 U. S. 199;
>
> *Stern v. La Compagnie Generale Transatlantique,* D. C. 110 Fed. 996;

and other cases, among which is that of

> *Western Fuel Co. v. Garcia,* 255 Fed, 817,

and makes the following remark concerning that decision:

> "Unless the California statute differs from the usual form of these statutes, Western Fuel Co. v. Garcia, 255 Fed. 817, 167 C. C. A. 145, deciding the contrary, cannot be sustained. It is true, as the court says, that the recognized principles of the maritime law are unaffected by local legislation, at least since the recent decisions of the Supreme Court. But the right to sue for damages resulting in death is not 'a recognized principle of the maritime law', but a new right depending so far on state statutes and subject to the conditions of those statutes. Besides, there are many other instances where the 'recognized principles of maritime law' have been affected by local legislation, such as pilotage, materialmen's liens, local regulations of navigation, and a number of others."

As this Court is aware that the case of *Western Fuel Co. v. Garcia,* is now before the United States Supreme Court on the very question, among others, of the bar of the action by reason of the limitation of the state statute herein referred to, we have no doubt that this

Court will desire to postpone a reconsideration of its ruling in that case until the United States Supreme Court passes upon the questions before it and those certified to it by this Court.

We feel that this court will therefore prefer to reserve its ruling in the present case until the decision of the Supreme Court in Western Fuel Co. v. Garcia, which we understand is expected during the coming term of that court.

We will therefore not discuss this subject further until the decision of the United States Supreme Court is rendered, when, if necessary, we may request the Court to allow us the privilege of a supplementary brief in the matter.

Of course, if we are right upon this point, the libel should be dismissed, at the cost of the libelants.

Another point that we feel it encumbent upon us to call the Court's attention to, is the fact that the California statute is a so-called "Death Statute", and as the deceased in this case died on shore, and not on the vessel the action is not of maritime cognizance, and this Court has no jurisdiction.

Hughes on Adm., 2nd Ed., p. 235, Sec. 113, with authorities therein cited.

APPELLEES' POSITION.

Appellees further contend that the vessel was properly equipped, that no negligence can be attributed to them.

This appeal being a trial *de novo,* appellees expect that the Court will make its order reversing the judgment and dismissing the libel.

It is the position of the appellees:

1. That the vessel was supplied with proper slings, both rope and chain. That a Spanish burton is not any part of the equipment of the vessel, but is purely an arrangement of ropes which crews make if they want to use such an arrangement, and in the event they do not desire to do so, none is made up.

2. That the rope sling with a single turn which was being used, was in use generally in the discharge of lumber cargoes.

3. That if there was any negligence, it was that of the mate—a fellow-servant—who, it is said, laid out the slings from which the men engaged in the vessel's discharge themselves selected the tackle for discharge. Further, that the vessel being supplied as she was with chain slings, and which libelants contend are proper, the use by the mate and men of the single turn rope slings was an act of a fellow-servant for which appellees are not liable.

4. That Flynn was experienced, both as a longshoreman and mate of vessels, that he was using the slings, and if dangerous he knew it; that if warnings were given to the mate by several of the men in such a loud tone so that all could hear and the protest being disregarded, it was Flynn's duty to quit, otherwise he assumed the risk.

5. That Flynn was guilty of contributory negligence in not standing clear in response to the warning, until the load was actually deposited on the wharf.

The Evidence.

VESSEL SUPPLIED WITH PROPER AND USUAL EQUIPMENT.

That the vessel was supplied with proper and the usual equipment is manifest from the testimony.

M. J. Fitzgerald, a superintendent stevedore, who had been engaged in handling lumber exclusively for 24 years, testified:

> "Q. Assuming that you are discharging lumber of two by twelve, and in lengths from ten to twenty feet, I will ask you whether or not, it was, in 1903 usual and customary to discharge such lumber with a rope, single turn?
>
> A. Yes, they are single turn most of the time, a rope sling practically all of the time.
>
> Q. Rope sling all the time, and single turn most of the time?
>
> A. Yes, sir." (Rec. pp. 161-162.)

The same witness further testified with respect to a Spanish burton as follows:

> "Q. With regard to a Spanish burton, where lumber is discharged by means of a gaff, was it customary to use a Spanish burton?
>
> A. We didn't use them at all in those days. The only time we used a Spanish burton was when we would have a donkey on the dock and use our own gaff and put on the burton; when a vessel had a donkey, we generally used the swinging gaff." (Rec. p. 163.)

With respect to the burton, there is also the testimony of the witness *Cainan,* called by libelants.

"XQ. 92. With regard to the Spanish burton that is something that any sailor man can rig up, can he not?

A. Yes, sir.

XQ. 93. It is just a system of ropes that the sailors, when they are discharging, if they want to use a Spanish burton, rig it up and use it. If they do not want to use it, they do not, that is all?

A. Yes, sir." (Rec. p. 62.)

R. McDonald, a stevedore of over 30 years' experience in handling lumber cargoes, testified:

"Q. What have you to say in regard to the practice of slinging large lumber with a rope sling, with a single turn, as far back as 1903?

A. Well, practically in that time I don't think there were any wire slings, and they were practically all rope slings; very few chain slings.

Q. How about a single turn?

A. Sometimes they would put on a single turn, just how the case might be.

Q. When you say 'how the case might be', what do you mean?

A. Well, according to the loads, and sometimes it would be up to the men themselves, whether they would put on a single turn or a double turn." (Rec. p. 170.)

* * * * * * *

"Q. In the case of a single turn, what can you say as to the practice among stevedores of driving the sling down tight with a stick of wood?

A. You tighten up the sling before the donkeyman calls the winchman; you generally have a block and you hit the sling down.

* * * * * * *

Q. When that is done, when the sling is struck with a block so as to drive the hook down, does it spring back, or is it likely to spring back at all?

A. No; the weight is on the load then. The winchman goes ahead and the weight is on the load.

Q. And it won't spring back?

A. No. If a man understands his business, he generally puts his sling on one side, in one corner of the load, and when the winchman goes ahead the sling tightens right up in the center of the load.

Q. Explain what you mean by that. Take a square load, for instance, or a load where the corner of the lumber is, do you mean he carries the hook over to the corner of the lumber?

A. Yes, and put your sling right there, and when he goes ahead the end of the sling goes through both loops, and you have one loop right here at the corner, and when he goes ahead, by the time the sling is tightened up it is right in the center of your load.

Q. *That makes the single turn just as tight as a double one?*

A. *Yes, just as tight.*

Q. *Is that the proper way to fasten a single turn?*

A. *That is the proper way.*"

The same witness on pages 170 and 171 of the Record, was asked:

"Q. How about the use of a Spanish burton when you have a swinging gaff?

A. I never have used one. I have seen it used on ships where they didn't have a swinging gaff.

Q. But in the case where they had a swinging gaff, did they use a Spanish burton?

A. No, they never used a Spanish burton."

On direct examination, *D. W. Nilsson,* who had acted as donkeyman on the "Sophie Christenson", and who had been on that vessel for about a year, testified:

"Q. How about those slings? Were those the usual or customary slings used on board vessels?

A. They were, so far as I know.

Q. You have been in the business how long?

A. I have been in there about a year, in the lumber trade. I have been always sailing to the Hawaiian Islands before. I hardly think it was a year I was in the lumber trade when that happened."

The testimony of the same witness on cross-examination at pages 27 and 28 of the Record, shows that in addition to rope slings the vessel had chain slings which were used in loading the cargo of lumber in the discharge of which the accident occurred. The following is the testimony:

"Q. Did you always use the same kind of sling?

A. *We used a chain-sling when we took the lumber in.*

Q. Why did you use a chain-sling when you took the lumber in?

A. Well, because—I can't tell that; that is the order of the ship.

Q. You don't know why they use the rope? Did you always use a rope-sling when you unloaded the lumber?

A. We did.

Q. That was only your second trip?

A. Yes, sir.

Q. Therefore, you only unloaded the lumber once before?

A. Yes, sir; and heaved it out, too.

Q. And so that is the only time you unloaded the lumber?

A. Yes, sir.

Q. *Both times when you loaded, did you use the chain?*

A. *Yes, sir.*

Q. How many times was the chain turned around the lumber to make the sling?

A. About two fathoms were fastened to the wire, to the hook, just the same as that wire fall. They

shackeled the piece of chain, about a couple of fathoms long, and in the other end of the chain is a hook.

Q. Did the chain go around the lumber once or twice?

A. It went around the lumber once."

Charles J. Baker, the lumber tally man, called for libelants, reluctantly admits that, with respect to the single and double turn slings,—"one way was used as often as the other". (Rec. p. 123.)

Hans D. Lungvalt states, (Rec. foot of p. 181), the slings were over three fathoms, and sufficient to have made a double turn if they had seen fit. And further, at page 182,

"Most of the men when they sling a load of lumber they will put the eye on the side of the load, and when they heave it tight it tightens up itself.

Q. When you fasten it in that way, does it bind the load the same way as a double turn, or does it not?

A. Just as good, with that kind of lumber.

Cross-Examination.

Q. At the time when the 'Sophie Christenson' was discharging her lumber, only one turn, a single turn, was used on that lumber?

A. At times they used a double and at times they used a single; it was up to the men to do so."

It is therefore evident from the testimony hereinabove quoted, that the appellees had supplied the vessel with chain slings and rope slings sufficient and proper for the work in hand; that rope slings were in common use, and that the single turn was a usual method of discharge. If there is any difference of opinion between men as to which method—single or

double turn—is preferable, that should not be resolved against appellees in the exercise of their honest judgment in using one of two usual methods. It can hardly be said to be negligence.

As to the complaint that the vessel was not supplied with a Spanish burton, it appears that this is no part of a ship's equipment, but is something always available to the sailor, which he rigs up if he wants it, and does not, if he does not desire to. It is only an arrangement made of available rope on the vessel. Furthermore, it was not used in 1903 at all, where the ship, as in this instance, had a donkey.

CONTRIBUTORY NEGLIGENCE.

If it be held that there was negligence on the part of appellees, there can be no doubt that Flynn was guilty of contributory negligence.

The Court in its decision remarked that

> "The general nature of such hazards as are incident to the use of a single turn, was well known, and injury could have been avoided by the exercise of a proper degree of precaution. That is, there was but a single peril, the *slipping of timbers from the load*, and manifestly workmen could protect themselves by standing back when the load began to rise and remaining back or keeping a lookout until it was *actually deposited* on the wharf. It is not a case where in using an appliance, known by him to be defective, a workman is subjected to a peril which it is impossible for him to escape. The view must be taken that the deceased knew quite as well as his superiors of the kind of perils attending the use of the different forms of slings and it

> was his duty to exercise care commensurate with the degree of peril. It was possible for him to be on guard until the load swung onto the wharf in harmony with the practice followed by some of his fellow-employees, and realizing, as he must have done, that the timbers were likely to slip out of the load, it was incumbent upon him in the exercise of due care, to keep a lookout until danger was past." (Rec. p. 189.)

In criticism of the Court's determination that the deceased was guilty of contributory negligence, proctor for libelants resorts to a fine-drawn effort. He says that

> "after the load swung on to the wharf it was not expected to return to the vessel. Clearly the deceased had then a right to expect that the load would not swing back from the wharf to the deck of the vessel".

In point of fact, the load never was landed on the wharf. It struck the stringer, and therefore had not entirely cleared the vessel. (*Cainan,* Rec. p. 46, qq. 55, 56.) The wharf was higher than the vessel. (*Cainan,* Rec. p. 47, qq. 71, 72.) (*Ehlert,* Rec. p. 78, q. 50.)

> "When the load came back, [was lowered away] it hit the stringer on the wharf because the ship was lower than the stringer, and it shook it, and half of it fell out between the ship's side."

That timbers do habitually slip from the load, regardless of the nature of the sling used, is practically the testimony of all the witnesses, and it is little comfort to feel that the injury might have been caused by a short, rather than a long, timber, as is intimated by the suggestion that the falling of long timber is not to be

expected. When there is slipping of the load, it is common sense that there is great danger at all times. Once a part of the load goes, the whole of it may go, and in fact it did.

It was the duty of the deceased to "exercise due care, to keep a lookout until danger was past", and that he did not do so is borne out by the evidence.

WELL RECOGNIZED HAZARD—THE ASSUMPTION OF THE RISK.

Concerning the well-recognized danger of the slipping of the load regardless of the nature of the sling used, the witnesses have this to say:

> "XQ. 107. When this was swung over, what were you doing?
>
> A. I was looking at it. We generally look to see that it goes clear of the ship. We don't like to see pieces falling out there every time." (*Cainan*, Rec. p. 64.)

> "Q. I will ask you in your experience whether it is a common and ordinary experience—I will put it stronger than that, whether it was not an every-day experience in discharging cargoes of lumber, for the lumber to fall out of the sling, no matter what kind of a sling you used?
>
> A. Yes; an every-day occurrence.
>
> * * * * * * *
>
> Q. Whether you use a single turn, a double turn, a wire sling, or a chain, I am asking you whether or not that is an ordinary occurrence, no matter what kind of a sling you use?
>
> A. Sure; no matter what we use, it happens every day, lumber falls down.
>
> Q. Has that been constant, in your experience?

A. Yes; whether we are using wire, or chain, or rope; it is an every-day occurrence with us.

Q. It is one of the ordinary risks, isn't it?

A. Yes; one of the ordinary risks." (*Fitzgerald,* Rec. p. 163.)

"A. I said that the lumber will slide at any time, with any kind of sling, from the middle of the load.

Q. With any kind of a sling?

A. Yes, with any kind of a sling, it will slip out of the middle of the load if there are some small sizes in it.

Q. Didn't you tell me that that was your daily experience during the twenty years—almost daily?

A. Yes, sir.

Q. It is one of the ordinary risks you take?

A. Yes, you are looking for it all the time." (*McPhee,* Rec. p. 179.)

The hazard attached to their occupation was well known, and furthermore, all engaged on the ship were men of experience in stevedoring work, and Flynn in particular, had been a mate of vessels, as well as a stevedore. If there was any more hazard attached to the use of a single turn than follows the use of a double turn, Flynn and those engaged with him knew it.

If the testimony of *Ehlert* and *Cainan* is to be credited, they knew of the hazard, and so did the other men.

Cainan says, in response to the question:

"Had you spoken to anybody about this rope before the accident happened?

We spoke on account of our own safety. I spoke to the mate about it, and so did the other men." (Rec. p. 49.)

"He spoke to the mate about it and to no one else." (Rec. p. 61.)

Ehlert says, (Rec. p. 79):

> "Q. 56. Before this accident happened, did you complain to any of the officers of the ship with regard to the sling that they were using?
>
> A. Yes, sir, I did.
>
> Q. 57. To whom?
>
> A. To the mate. * * * There was lumber fell out the day before. I told him that somebody would get killed here yet with the slings."

It is the testimony of *Woodson* (Rec. pp. 152, 153), that a conversation was held between Buckley, the foreman of the lumber company, and the mate right alongside the stringer (Woodson says the master, but it is apparent from Buckley's testimony it was the mate) while Flynn was on the dock, in a loud tone, loud enough for everybody to hear, complaining of the slings.

> "Q. Everybody, then, was warned that it was dangerous and they were all keeping out of the way?
>
> A. I was, I don't know that the others were.
>
> Q. Well, they were all warned, weren't they, by that conversation that it was dangerous?
>
> A. They ought to have been."

So it is apparent, that not only the nature of the hazards attached to the use of slings generally, were known to all, but it is also in evidence that all were warned by the protests made to the mate, as to any particular hazard of the single turn.

It was therefore the duty of Flynn to at least use due care to keep a lookout until the load was *actually landed*—to "exercise care commensurate with the de-

gree of peril", and the Court found that he failed in this.

In addition, it was his duty to quit the work when the protests were disregarded by the mate, otherwise he assumed the risk.

Upon the question of *contributory negligence,* and also of the assumption of the risk, the case of

The Scandinavia, 156 Fed. 403, is in point. Libelant in that case was using a ladder, which was broken off at one end, so that when the end was put down it was likely to fall, but could be safely used by putting the other end down. The libelant's attention had been called to the condition of the ladder, and he was advised of the proper manner of using it. He went on shore one evening, using the ladder, which he left on the wharf, and on his return, placed the same with the broken end down, and it fell with him, causing him injury.

It was held that he assumed the risk of using the ladder in its known condition, and that his injury was due to his own want of care. As the opinion states, the fault of the libelant was substantially admitted by his proctor,

> "who contends that he was guilty merely of contributory negligence; that the initial fault was that of the claimant, in that it did not furnish to its servant a suitable instrument for his use; that the libelant did not intelligently and distinctly assume the risk of using the defective ladder; that he is not shown to have fully appreciated the dangers of using it; that such dangers were not fully explained to him, or brought clearly before him, although he was warned of the defect; and that at the time of the injury he did not have in mind the condition of

> the ladder, and so used it and was injured. The libelant invokes the authorities that, before a servant can be held to have *assumed a risk,* he must be shown to have *understood and appreciated* the nature of it. He further urges with great earnestness that he was a seaman; that the ladder was one of the furnishings of the ship; that his duty as a seaman made it incumbent upon him to follow the orders of the master, and to use such appliances as were given him; that a seaman cannot leave the ship, but must obey orders, and use such things as are placed in his hands by the master''.

The Court comes to the conclusion that it cannot sustain these contentions, because it was shown that the libelant knew the condition of the ladder, and that he acted upon such knowledge; that he was familiar with its customary use. And as a consequence, the Court held that he had assumed the risk.

The Court also stated that it was unnecessary to decide whether or not the libelant was a seaman, as the boat upon which he was engaged was not in operation, and

> ''There was nothing to prevent him from leaving the employment. If the ship, or any of its tackle and apparel, did not suit him he was at liberty to leave at any moment. The familiar law with respect to the duty of a seaman to obey the orders of the master has no application here; for the libelant was not at sea. He was under no captain. The case shows that his employment was not such as to make it incumbent upon him to remain upon the ship for a moment longer than he desired.'' (p. 406.)

After quoting a number of leading cases on the question of the assumption of risk the Court comes

finally to the conclusion that after a study of the uncontradicted facts, and an application of the well-known principles of maritime law, the fault was entirely upon the part of the libelant.

> "He was not placed by his employer in a position of undisclosed danger. He was not dealing with complicated machinery. He knew whatever defect existed in the ladder. * * * if he had taken care, he could have used the appliance safely. He knew the ladder better than any one else, and assumed the risks of its use. His negligence was the immediate and proximate cause of the injury."

The libel was accordingly dismissed.

So, as we have said, in the case at bar, not only were the nature of the hazards attached to the use of slings generally, both single and double turn, known to the deceased, but everybody had been warned by the protests said to have been made to the mate concerning the same.

Flynn was in the same position as the libelant in the case above quoted.

He was not a seaman. While he was working with the crew, and a fellow-servant of the mate, nevertheless not being signed on the vessel, it was not "incumbent upon him to remain upon the ship for a moment longer than he desired".

Another case of strength in this connection, is that of *The Serapis,* 51 Fed. 91, where at page 93 the Court remarks:

> "Now, the question is whether the owners of the steamship Serapis can be called negligent because they had on board the steamer a winch which had

> been there for six years, in continual use, was in perfect order, but required more care on the part of the person who worked it than some more modern machines of the kind. And this, too, when the machine was well known to the employe, and that it required somewhat more attention on his part than other machines fitted for similar use. We are of opinion that where a workman is employed to do certain work with a machine which he fully understands, though it may not be of the newest pattern, but nevertheless is in perfect order of its kind, and may require more care than newer patterns, *he takes the risk of all accidents which may befall him in its use.* And if, as is the fact in this case, he did not exercise the care required, he must suffer the consequence of his negligence. This libelant's misfortune has our deepest sympathy, but to do injustice through sympathy for the injured is to do away with law, and make recovery for loss dependent on the tenderness or want of it in the feelings of the court. We think the decree of the district court in this case should be reversed; and it is so ordered."

The similarity of the case above quoted from with the instant case, is marked.

It is undisputed that rope slings were in common use, and that a single turn, in the discharge of lumber cargoes, was usual. The deceased was an experienced stevedore, and knew of the hazards of the slipping from the slings of both double and single turn, and was aware of the protests said to have been made to the mate on the use of the single turn. The sling was therefore "well known to the employee", and he also knew "that it required somewhat more attention on his part than other" slings "fitted for similar use".

The remark of the court in *The Serapis* case is peculiarly applicable, when we consider its statement that

> "We are of opinion that where a workman is employed to do certain work with a machine which he fully understands, though it may not be of the newest pattern, but nevertheless is in perfect order of its kind, and may require more care than newer patterns, he takes the risk of all accidents which may befall him in its use."

The most potent evidence of the knowledge of the deceased of the hazard of the slipping of slings, is his act in stepping back, in conjunction with others of the stevedores, when the load arose, and his contributory negligence occurred when he stepped forward from his place of safety before the load was actually landed.

Finally, in the case of *The Wilhelmina,* 232 Fed. 430, a stevedore, injured while stowing cargo by the slipping of a defective winch, was charged with contributory negligence, where he remained on the work with knowledge that the winch was defective and dangerous, although on the occasion of the injury he did all he could to protect himself.

The Appellate Court, on the subject of the fault of the libelant, states:

> "The court below found the libelant to be at fault himself, and reduced his damages for that reason, and this is complained of by the appellee. The libelant's testimony was to the effect that the winch had been slipping during the morning and prior to the accident, and that complaint had been made by the foreman to the officers of the ship to that effect. It seems reasonably free from doubt

that the libelant was informed of the condition of the winch and knew the probable danger to him consequent upon it. He seems to have protected himself to the best of his ability from the descending load at the time of the accident, and no fault is to be attributed to him in that respect. He, however, continued to work in a place of danger, after realizing the peril of so doing. While, as between him and the appellant, there could be no assumption of risk, [this is because as the court previously remarked, 'he was not the employe of claimant'] he might still have been guilty of contributory negligence in remaining at work, when the conditions were such that a reasonably prudent man would not have done so. This was the conclusion reached by the District Judge, and we agree with it."

THE ACCIDENT, AND FLYNN'S CONTRIBUTORY NEGLIGENCE.

The testimony of *Lungvalt,* the master, recites the accident as follows:

"Q. Did you see the accident?

A. I did.

Q. What happened—tell us how the accident happened.

A. I came along from aft and was going forward. I was going to talk to the steward; I was going to tell him to bring me some breakfast; it was about ten or fifteen minutes after eight o'clock in the morning; when I came forward *they were heaving a load up out of the hold, and the load started to slip;* there were a couple of planks slipped out of the load 12 by 12, and I suppose 20 pieces in it. I seen the pieces start to slip out, and I said to everybody, 'Get out of the way, get out of the way.'

And everybody was out of the way, all walked away, and the load swung in to the wharf. When it came in to the wharf the donkeyman didn't let it go; he could have let it go, but he kind of held on,

> and the load swung back and one plank slipped out again and it stood on end; Mr. Flynn, the man that got hurt, had gone back, he was warned to get away and he was away, he was between the poop and the mizzenmast, but he went back again; nobody told him to go back; he went back on his own account, and this plank fell out and hit him on top of the head." (Rec. p. 180.)

Part of the foregoing testimony is printed in appellant's brief on page 10, without indicating the omissions which they have made in the testimony. Reading the testimony, including that omitted by appellant, it is apparent that the men were all warned of a slipping load—slipping while it was being hoisted above the deck —a dangerous load—as Nillson puts it, and they got out of the way. Then when it swung in to the wharf the donkeyman didn't let go, and as the testimony of Cainan shows. (P. 46.)

It struck the stringer of the wharf. Warned that this was a dangerous, slipping load, Flynn failed to watch it, to keep a lookout—he failed to do what appears from appellant's brief page 10 he should have done—look after it *"until it is clear or gets landed"*. And it never was clear, for it struck the stringer on the edge of the wharf and it never was landed because it fell into the water, and on the deck.

It is evident that Flynn's fellow-employes recognized that danger, for his crew alone came forward before the danger was past. As the Court said:

> "It was possible for him to be on guard until the load swung on to the wharf in harmony with the practice followed by some of his fellow-employees, and realizing as he must have done, that the timbers

> were likely to slip out of the load, it was incumbent upon him in the exercise of due care, to keep a lookout until danger was past."

The inaccuracy of the recitation of the circumstances surrounding the accident as set forth in appellant's brief lies in the assumption that the load swung on the wharf and was landed—that the danger was past. In fact it is shown that the danger was ever present, that all knew it, that the load rose—a dangerous load—and striking the stringer before landing, fell out.

Appellees are criticised because after *seventeen years* they are not able to bring the mate as a witness. The appellees were warranted in believing the action had been abandoned after so long a period of inaction. And in matter of fact, proctor for libelants himself by letter stated that he had forgotten this old case. In the trial of causes it is preferable that the testimony be taken in open Court, but appellees were not so fortunate as to be able to locate the mate after so long a lapse of time. We think the Court will appreciate the injustice of the criticism and the difficulty of locating seafaring men after so many years, and especially since the World War.

We also wish to but add a word to the suggestion in the brief that the Spanish burton should have been supplied by the ship and the lack of its contributed to the accident. It is only necessary to say that appellants' own witness testified that the burton is no part of the ship's equipment, and is made up of rope by the sailors themselves if they choose to use it. Further, there

is the evidence of Fitzgerald and others that the burton was never used when the ship had a donkey.

It is said that Flynn was engaged in the performance of a hazardous duty imposed upon him by his employers. Appellants lose sight of the fact that he was not a member of the ship's crew, but was a stevedore, and one who, as the Courts say, in speaking of the assuming of the risk by the employe, was a free agent to accept or decline risks of which he is aware.

IF THERE WAS NEGLIGENCE, IT WAS THAT OF A FELLOW-SERVANT—THE MATE.

The relationship between the mate and Flynn is testified to by Buckley. (Rec. pp. 137, 138.)

> "Q. Mr. Butler, was Mr. Flynn working for you at the time?
>
> A. No, working for the vessel.
>
> Q. Who was his foreman?
>
> A. The mate or captain usually hired the men on the boat that were doing what they call longshoreman work.
>
> Q. Then really the mate was his foreman at that time?
>
> A. Yes, sir.
>
> Q. And he was working now—his part of the work of discharging the vessel—just the same as a member of the crew would be working?
>
> A. Yes, sir.
>
> Q. In other words—the longshoreman who goes on board to discharge is in the same relation to the mate as a member of the crew is in discharging?
>
> A. That is my opinion."

Ehlert testifies, (Rec. p. 93):

"XQ. 128.

A. That is all. He was taking the second mate's place. The second mate was supposed to work lumber in those ships. The second mate was made mate.

XQ. 129. And Flynn was working about two days and a half when this accident happened?

A. Two days and a half, longshoreman.

XQ. 130. He was not a member of the crew?

A. No, sir, he was not a member of the crew."

Cainan's testimony on page 67 of the Record, shows that the mate gave directions with regard to the tackle to be used in discharging.

"Re-D. Q. 6. Who would give directions with regard to the gear and tackle to be used in discharging?

A. The mate looked out for that."

Cainan, Rec. p. 43:

"Q. 24. The mate was giving orders?

A. Yes, sir."

P. 61,

"XQ. 83. When was it you say you spoke to some one about the sling?

A. I suppose about as soon as we started to work.

XQ. Whom did you speak to?

A. I spoke to the mate about it.

XQ. To no one else?

A. No, sir, to no one else."

Baker, Rec. p. 118:

"Q. In other words, it is the mate's business to superintend the discharge?

A. Yes, and they always do.

Q. The mate was in charge at this time, was he not?

A. Yes."

The Courts in this jurisdiction have so often held that the mate of a vessel is a fellow-servant with a member of her crew or with a stevedore who is himself in the employ of the vessel, that authority to this point is unnecessary. It is, however, necessary and proper to point out that the accident herein complained of occurred in 1903, twelve years previous to the Act of March 4, 1915, known as the "Seaman's Act", which provides that seamen having command shall not be held to be fellow-servants with those under their authority. The act not being in existence the law that the mate is a fellow-servant with the crew was at the time of the accident undisturbed.

In discussing the acts of the mate as a fellow-servant, we do not overlook the remark of the Court that it was the non-delegable duty of the respondents to take reasonable care in providing safe appliances for carrying on the work. But this they had done, when they provided slings which were usual in the discharge of lumber ships. There was available for use on the vessel both the usual rope and chain slings, and all that it was in the power of appellees to do had been done. If they were to do anything further it necessitated the vessel owner traveling on the ship as a sort of supercargo, and each time of discharge or loading, to personally cut the rope for the slings in proper lengths and assign the tackle to the crew engaged in the work if there was a choice between chain or rope slings. In the

very nature of things, the assignment, cutting the rope and making up of the tackle for discharge, must be left to the proper officer of the ship, who is the mate. If the mate selects from suitable equipment that which is not, it cannot be said to be other than the negligence of the fellow-servant.

It is the testimony that it was the duty of the mate to give directions with respect to the gear and tackle to be used in discharging. As Cainan said, "the mate looked out for that". He was further giving orders and had charge of the whole matter of the discharge. Protest is said to have been made to him concerning the slings, which he disregarded. We feel that it is evident that if there was any negligence, it was that of a fellow-servant, for which, under the law, appellees are not liable. That Flynn was the fellow-servant of the mate, is clearly of record in the testimony of Buckley, where he states that Flynn was working for the vessel, and the mate was his foreman; that Flynn was working just the same as any member of the crew would be working.

So too, if it is true that proper warning was not given of the risk, it was the duty of the mate to give that warning. (Nilsson, p. 37.)

> "Q. It is the duty of the mate to watch the load and sing out if there is any danger?
>
> A. Yes, sir. He did watch it, he watches every load that goes out, and takes hold of the load and swings it over the rail.
>
> Q. It is the duty of the mate to watch it and warn them of the danger?
>
> A. Yes, sir."

Further, if a burton was necessary to guide the load, all that was necessary to do was for the sailors to rig it up. It was not, as we have seen, any part of the ship's equipment.

THE DAMAGES CLAIMED TO HAVE BEEN SUFFERED BY LIBELANTS.

As is apparent, appellees do not consider there is any liability at all attaching to them.

However, we follow the brief of the libelants somewhat in the order in which the matters are therein presented, and we now come to the loss which they claim to have suffered.

Proctor for libelant states, that the original decision of the Court was modified without any new evidence having been presented in the interval, and indicates that he does not feel that the modified judgment is adequate.

What actually occurred, and what occasioned the modification of the judgment, was that the Court had called to its notice the fact that the accident for which the damages are claimed, occurred seventeen years prior to the trial of the cause, and as a consequence thereof, felt bound to measure the damages as of the time of its occurrence, and not as of a time when conditions had become greatly changed, and were in fact abnormal.

The Court had before it the case of *Chesapeake & Ohio R. Co. v. Addie Kelly,* 241 U. S. 485, which is of definite value on the subject of damages. The decision in that case is,

The measure of damages for death is the present cash value of the future benefits of which the beneficiaries were deprived, and not an aggregate sum based upon his probable earnings for the rest of his life.

This is coupled with the suggestion that,

One seeking to recover damages for the wrongful act of another, must do that which a reasonable man would do under the circumstances to limit the amount of the damages.

The verdict was for $19,011.00, which was apportioned among the widow and infant children of the deceased.

The appeal was based upon the refusal of the trial court to give an instruction embodying the above principle.

The judgment was reversed by the Supreme Court.

The rule thus stated finally disposes of the question of damages in the present case, and places beyond question the fact that the damages contended for by appellants are grossly excessive for a man 42 years of age, engaged in intermittent work at $4.50 a day, and at other times at $75.00 a month.

In this connection, also, we desire to call attention to the suggestion of the Supreme Court of the application to a case of this kind of the principle that,

One seeking to recover damages for the wrongful act of another, must do that which a reasonable man would do under the circumstances to limit the amount of the damages, and suggest its application to the fact that

it is now 17 years since the accident occurred. The libelant is the moving party, and failed to bring the action to trial during that period. It is elementary that he should not be permitted to gain by his own negligence.

The 17 years, therefore, should not be permitted to be the basis of any increase in the award. The "present cash value" referred to in the decision, is the "cash value" at the time of death. The fact that libelants failed to reduce their claim to a judgment within a reasonable time after the accident, should not be allowed to increase the amount of the judgment. That is libelant's fault, and the burden should not be placed upon the respondents.

Further cases as to the measure of damages follow.

In the case of *Farmers Loan & Trust Co. v. "Toledo"*, damages fixed by the master were reduced by the Court.

> "The question, however, about which I have been more perplexed, is the amount of damages awarded by the master. He has given the basis upon which that award was made. The earning capacity of these two men was shown. Their probable future life was established by the annuity tables, and the master, giving due allowance for the extra hazard to life because of the nature of the employments of the deceased, made his calculation, and allowed to Cassie Alberts the sum of $9,935, and to Ida Beaulieu the sum of $11,606. It is evident in this estimate that the master has given to these petitioners the full benefit of all the probable years of life before them, and the full benefit of their present maximum earning capacity. One of the most difficult questions for a court to determine is a correct and just measure of damages in a case of this

kind. It is hard to say that a human life is not worth such a sum as the master has given on this case, because the record shows these men were men of excellent habits, fond and affectionate husbands, and in every way a help and comfort to their families and useful to the public, and it is with great reluctance that I interfere in any way with this award. But in a large number of states where the limit for the loss of life has been fixed by legislation the sum of $10,000 has been fixed as the maximum allowance to be made. This is a legislative construction of a fair maximum sum to be awarded in such cases. I think the court may properly, therefore, accept this concurrent judgment of so many different state legislatures as justifying it in saying that the maximum ought not in any one of these cases to exceed that sum. So that, if the petitioner, Ida Beaulieu will remit sufficient of the award made to her to reduce it to the sum of $10,000, and if the petitioner Cassie Alberts will remit sufficient of the award made to her to reduce it to $8,500, the court will then approve an award to that amount, and order the receiver to pay the same."

Hall v. North Pacific R. R. Co., 134 Fed. 309, De Haven, J. Deceased was between 52 and 53 years of age, and had been living with his family, consisting of himself and seven children.

The Court allowed $5000.

Felt v. Puget Sound Electric Ry., 175 Fed. 477, Van Fleet, D. J., sitting in the Circuit Court, Western Division of Washington.

This was a motion for a new trial, on the ground that the damages awarded by the verdict are excessive.

(Syl. 4.) "Decedent, a stone mason by trade, 47 years old, and in good health, with ability to

> earn wages at from $6.00 to $6.50 per day, was killed when attempting to alight from defendant's moving electric car. He was a kind, affectionate father, and devoted most of his earnings to the support of his family. There was no evidence as to his habits of industry or sobriety, except that on the day he was killed there was evidence that he had spent the afternoon with a companion in a saloon playing cards and pool, and that, after they boarded the train, they were seen by fellow passengers drinking from a bottle. HELD, that a verdict for $10,000 was excessive, and should be reduced to $6000."

The facts regarding earning ability are better than the facts now before the Court, and Judge Van Fleet referred to the fact that the trial Court had before it all the witnesses and instruments of evidence at first hand; all he [Judge Van Fleet] had, was an inadequate record; and also that the trial Court denied a motion for new trial, and that every intendment and implication must be indulged in to support the judgment. And proceeded:

> "Having these principles in mind and with due regard for the considerations flowing therefrom which should cause the court to hesitate in the premises, it seems to me that in view of the very meager showing on the subject of the deceased's earning ability and the other elements properly to be considered in estimating the damage suffered by the plaintiff, and considering that phase of the case alone, there is no escape from the conviction that in making the large award it did the jury ignored or went outside the evidence in the case. By no conceivable mode of just computation under the rule as to the measure of damages submitted to it could the jury have reached so large a result upon the facts before it. While, as stated, the evi-

> dence in this respect was uncontradicted, it left the deceased's earning capacity as based upon his habits of industry essentially lacking in certainty; and I know of no rule which will permit the jury to roam the field of conjecture or draw upon their imaginations for facts not disclosed by the evidence. It is said in effect that, conceding the lack in this respect, the jury were entitled to consider the loss of deceased's society, protection and guidance, which is in its nature of uncertain value. But, while this is an element of loss, it is only its pecuniary, and not its sentimental, value; and it must have a limitation within reason as based upon the evidence. In that respect likewise the evidence was lacking in definite substance. The only evidence bearing upon the subject of deceased's personal habits related to the incidents of the day of the accident, and that, it is sufficient to say, was not of a character to justly influence the jury to so large a verdict."

The Saginaw and the Hamilton, 139 Fed. 906. This is a case of exceptions to commissioner's report.

The matter was referred to a commissioner, who reported damages for eight different persons that were deceased.

In his report he stated the rule taken from the Delaware reports as to the assessment of damages (p. 909), and gave a large number of citations with respect to the rule of the Federal Courts.

The District Court reviewed his findings, and upon the subject of

Mortality Tables, as a means of determining damages, quotes from a decision of Judge Simington, who said he had

no confidence in such tables. The Court then modifies the conclusions of the Commissioner with respect to said claims, reducing them considerably:

1. $3500.00;
2. 7500.00;
3. 4500.00;
4. 4250.00;
5. 2500.00;
6. 4250.00;
7. 3500.00;
8. 750.00.

Ages:

1. 18 years;
2. 60 "
3. 40 "
4. 42 "
5. 53 "
6. 35 "
7. 16 "
8. 1 month.

Yearly wages:

1. $360.00;
2. 924.00;
3. 624.00;
4. 600.00;
5. 324.00;
6. 550.00.

Reduced by the Court to

1. $2,000.00;
2. 6,000.00;
3. 3,000.00;
4. 2,750.00;
5. 1,500.00;
6. 3,000.00;
7. 2,000.00;
8. 400.00.

On appeal to the Circuit Court of Appeals, 146 Fed. 724, one of the questions submitted was, shall the awards made by the Court be increased, or reduced, and the Circuit Court of Appeals said:

"That the amounts allowed by the final decree do substantial justice to the claimants."

Humboldt Lumber Manufacturers' Association v. Christopherson, 73 Fed. 239, C. C. A., 9th Cir.

Syl. "4. Damages.—$7,000 and $5,000, respectively, held, not excessive awards by the court of admiralty for the death by drowning of the master and cook of a schooner, they being in good health at the time, and earning wages of $100 and $50 per month, respectively; the master being 35 and the cook 39 years old."

State of Maryland v. Hamburg-American Steam Packet Co., 190 Fed. 240.

The deceased was 40 years of age. Left a wife and five children, the eldest of whom was 16, and the youngest 3 years. He earned about $10 a week.

"An allowance of $4,500 to his widow and children in the aggregate would be fair and reasonable."

Affirmed on appeal.

Cheatham v. Red River Line, 56 Fed. 248.

Father 38 years of age, children 6 months, 2½ and 5 years old. Earned the wages of a deck hand. Had been in the habit of devoting all of his wages to the support of his children, to pay for their subsistence and rent, per month, $16.50, besides providing for their clothes.

Damages allowed, $2,500.

The observations of the Court on the method of fixing the damages at $2,500 are cogent. He points, among other things, to the fact that many states limit

the recovery to $5,000, and the only act of Congress authorizing a recovery in case of death fixes the limit of damages at $5,000.

Boden v. Demwolf, 56 Fed. 846. (Syl.)

"Under a libel to recover for the wrongful death of a stevedore's employe, it appeared that deceased was about 50 years old, had a wife and 4 children, and received 50 cents an hour when he worked, but there was nothing further to show the amount of his earnings. Held, that $1,500 should be awarded to the next of kin."

In re California Nav. & Imp. Co., 110 Fed. 670.

The question of damages is treated on page 675 to 677. In this case, the judge reviews and states the principles applicable in this state, and under the state statute, where only the direct pecuniary loss to the heirs can be recovered. The uncertainty of his future state of health and ability to labor or to secure constant employment at the present rate of wages, must be allowed due weight.

Damages allowed to three separate administrators of three deceased parties, as follows:

One, $3,000.00; one, $5,000.00; one, $2.750.00.

St. Louis Iron Mountain & So. Ry. Co v. Craft, 115 Ark. 483.

Here a man was mangled by a railway train, and his suffering and anguish before death was a subject for consideration.

A jury allowed $11,000 to the administrator, and the Supreme Court reduced it to $5,000.

The matter went to the Supreme Court of the United States, 237 U. S. 648, and that Court said that the award of $5,000 as damages for pain and suffering *does seem large,* but the question of excessive damages was not open for reconsideration in that Court. (p. 661.)

By the foregoing, we think the Court is placed in possession of some of the decisions in this very jurisdiction, which, under the circumstances, ought to control. We have also referred to decisions of other Federal Courts, both District and Circuit Court of Appeals, which we think give a fair idea of the principles to be applied in an admiralty cause, and of the disposition of the Courts generally with respect to damages to be allowed.

We respectfully submit, with respect to the question of damages, that under all the facts of this case, and the principles announced by the Court in its opinion, $2,500.00 would be a large award. But, as indicated, our position in this matter is, that the cause being a trial de novo, the Court, recognizing that the appellees herein are not liable for the accident which occurred, will render its judgment ordering the dismissal of the libel.

IF THERE BE ANY LIABILITY, THE PART OWNERS (EXCEPT THOSE AS TO WHOM THE ACTION HAS ABATED BY REASON OF DEATH) ARE LIABLE ONLY TO THE EXTENT OF THEIR PROPORTIONATE INTEREST IN THE VESSSL.

Appellants' next claim that the decree of the lower Court should have been for the full amount of the damages against each of the respondents in solido.

The complete answer to this contention is contained in section 18 of the Act of June 26, 1884, Comp. Stat. Sec. 8028, and is as follows:

> "The individual liability of a ship-owner shall be limited to the proportion of any or all debts and liabilities *that his individual share of the vessel bears to the whole;*"

It is held in the case of *Richardson v. Harmon,* 222 U. S. 96, 56, L. Ed. 110, that part owners are liable only to the extent of their proportionate interest in the vessel, for a tort.

So, when the lower Court directed that the decree be against each of the respondents severally, for his proportionate share, the decree was in accordance with the statute with respect to limited liability, and with the decision of the United States Supreme Court above referred to. No further authority for this is required than the statute as interpreted by the Supreme Court.

The statement of the appellants to the effect that each respondent is liable for the whole amount of the damages, is without foundation. The evidence amply shows there is no negligence attaching to them, and if there was any negligence, it is alone that of the fellow-servant, for which, in law they are not liable.

Furthermore, there is no proof as to any knowledge on the part of the respondents of the methods used in the discharge of the cargo, and before any suggestion of liability can be attached to them, actual knowledge of the alleged negligent methods must be shown to have existed.

As we have repeatedly said, the evidence shows that the vessel was furnished with rope and chain slings, and that the making of the slings, and the selection of the tackle, was with the mate, who, in this particular case, made them from new rope. If he cut them too short for two round turns, it is not the personal negligence of any of the respondents.

The Court will see by an examination of the testimony of Buckley and Baker that the matter of preparing the slings was in the mate's charge, and that he was the foreman. So far as the protests are concerned, they were made, if at all, to the mate, and to no one else. There is no evidence connecting any one of the respondents with any of such protests, and the master denies ever having been spoken to about it. Cainan and Ehlert both say they spoke to the mate for their own safety, and to no other men, and that they picked the slings out themselves, and made up the load to such size as they saw fit. Buckley was uncertain whether he spoke to the mate or master, but when he states the man's name was *Hansen* it is evident that it could not have been *Lungvaldt,* the master.

The next position taken by the appellants is, that, assuming each of the respondents against whom the decree was rendered was entitled to the limitation, the decree should be against each individual for their proportion of the full amount of the damages which his individual share in the vessel bears to the whole of the shares liable. In other words, it is their proposition, that the deceased part-owners pay nothing, and that the

living part-owners pay the whole award, subject to the provisions of the limitation act.

The proposition hardly requires reply.

The liability was fixed at the time of the accident, and all parties were living, and it is not increased by the subsequent death of some of the part-owners.

THE MASTER AND E. A. CHRISTENSON.

Finally, as a fifth proposition, the appellants contend that if the award of the Court below be affirmed, the decree should be against each of the respondents above named for the full amount. This, on the assumption that if there was negligence, it was due to the personal act or neglect of these respondents.

In an effort to establish this proposition, appellants obtained the permission of this Court to take further testimony, and as the result thereof took the deposition of Mr. E. A. Christenson. It developed from his testimony, that on March 3, 1903, he ceased to have any interest whatsoever in the schooner "Sophie Christenson", and as a consequence, ceased to be the managing owner. So that the statement in appellants' brief that the argument as to Christenson's responsibility applies perhaps with less force than that as to the master, has some cogency. On page 2 of his deposition, Mr. Christenson is asked:

> "Q. What interest did you have, Mr. Christenson, in the 'Sophie Christenson' on August 3, 1903?
> A. None.

Q. Did you have any interest in her before August, 1903? A. Yes.

Q. What interest? A. Two-thirty-seconds.

Q. A two-thirty-seconds interest? A. Yes.

Q. When did you dispose of that?

A. I disposed of 1/32 on January 8, 1902, and 1/32 on March 3, 1903."

And on page 4:

"Q. Who was the managing owner of the 'Sophie Christenson' on August 3, 1903?

A. I don't know.

Q. There was a managing owner, was there not?

A. Not according to the records, and that is all I have to go by.

Q. Did you refresh your memory by the records in the Custom House before you came here today?

A. Yesterday.

Q. When, if at all, were you the managing owner of the 'Sophie Christenson'?

A. Up until March 3, 1903.

Q. According to your ideas, you ceased to be managing owner on what date?

A. March 3, 1903.

Q. Why?

A. Because I had no further interest in the ship."

It thus develops that Mr. Christenson was improperly made a defendant in the action, and while being a defendant, it was proper for him to sign the answer, it was an inadvertence, as he testified, for him to sign for so-called co-owners.

Not being managing owner, and in fact not being an owner at all, there can be no liability on his part and the discussion of that subject by appellants is out of place.

As to the master, it is said that the testimony shows that the slings for the discharge, were provided by him, and to substantiate this assertion, a quotation is had from the testimony of Ehlert—pure hearsay, and which was objected to on that ground—to the effect that the mate told him that when they were making the slings, he told the captain they were too short.

In addition to the fact that the testimony is hearsay, it is emphatically denied by the master, who, on being questioned testified:

> "Q. Did Mr. Buckley, or anybody else, come to you to make a protest about using a single turn rope? A. No, sir. No, sir."

Again, quotation is had from the testimony of Buckley, to the effect that he spoke either to the master or to the mate, protesting against the use of one turn.

That he did not speak to the master, and that if he spoke to anybody it was the mate, is evident from Buckley's further testimony (Rec. p. 132), where he says:

> "Q. Who did you ask that?
> A. Either the mate or the captain. This is so long ago it has gotten out of my head, but I asked some one there—the mate or the captain—Captain *Hansen.*"

The name "*Hansen*" is omitted from the quotation on page 22 in appellants' brief, but it is the earmark that indicates that he did not speak to the master, as the name of "*Lunvaldt*" or "*Lungvalt*"—however it may be spelled—is not likely to lie in the mind of the witness as "*Hansen.*"

So, it is probable, that if Buckley in fact spoke to any one, it was to the mate, and it was to him that Woodson heard Buckley speaking.

Though the master is not in any way connected with the furnishing of the slings, and had no part in the supervision of the discharge, the appellants content themselves with his confirmation of other witnesses, which was to the effect that rope slings, with a single turn, were in 1903 in general and usual use. He expressed his opinion that this usual use of the single turn was proper for the kind of lumber which was being discharged by the vessel, and stated that if he were sending up a load of large lumber he would use a single turn.

How any fault can be found with this, or how an alleged personal negligence can be made out of it, we cannot understand. It is candid, the method referred to is testified to by other witnesses as usual, and it is an expression of opinion many years after the accident in question.

Neither is the criticism of the master justified, with respect to his testimony concerning his having no interest whatsoever in this litigation. He testified in April, 1920, and it is not only possible that he disposed of his interest in the vessel as Mr. Christenson did, and therefore felt that he had no further interest in the matter, but it is the fact that the master has not been an owner in the vessel for at least eight years past, and the vessel's ownership record so shows. It is an unfair

suggestion that he was not telling the truth at the time he testified.

We do not desire to conclude and allow the impression to be entertained by the Court, that Judge Detrick, because of limited time did not give this matter full consideration, for, as the record will show, the matter was before him in the nature of a rehearing. Furthermore, the matter of the final decree as to the question of the proportion of the judgment which each individual respondent should bear, was presented to his Honor through correspondence in his jurisdiction in Boise, Idaho.

It will therefore be seen that time was had for mature consideration.

CONCLUSION.

We are sorry to find that an appeal is made on the basis of sympathy, and while it is only natural that one's feelings should go out to persons who have had a misfortune, nevertheless, there is nothing gained by attempting to have those who are not responsible for the misfortune, answer for it. As said by the Court in *The Serapis,* in 51 Fed. 93, and heretofore quoted by us:

> "Libelant's misfortune has our deepest sympathy, but to do injustice through sympathy for the injured is to do away with law, and make recovery for loss dependent on the tenderness or want of it in the feelings of the court."

We respectfully submit:

As stated in the opening of this brief no cause of action lies in libelants because the action is not brought within the time fixed by the State Statute. Further the action is not of admiralty cognizance because the right of action was consummate on land.

We further submit:

1. That the respondents had done all they could possibly do for the proper equipment of the vessel, and she was in fact equipped with slings generally and usually used.

2. That if there was any negligence, the negligence was that of a fellow-servant, the mate, for which the respondents are, in law, not liable.

3. That the deceased is shown to have been an experienced stevedore, the mate of vessels, and fully acquainted with all the hazards of his calling, the risks of which he assumed.

4. That the deceased failed to take the usual precautions which were followed by some of his fellow-employes, and failed to exercise due care to keep a look-out until danger was past, and is chargeable with contributory negligence in advancing under the load before it had been safely landed. Further, that if the statements of the libelants' witnesses are correct, he was warned of any peculiar hazard that it is claimed is attached to the use of a single turn, and it was of a consequence, his duty to quit, failing which, he assumed the risk.

No right of action existing in appellants and further, this appeal being a trial de novo, we respectfully submit that the judgment of the lower Court should be reversed, and that the libel should be dismissed.

Dated, San Francisco,
February 1, 1921.

Respectfully submitted,
NATHAN H. FRANK,
IRVING H. FRANK,
Proctors for Appellees.